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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-112

C. FRANCIS MURPHY, CORPORATION COUNSEL OF THE DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

NANCY SULLIVAN, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the "federal question" jurisdiction of the United States courts under 28 U.S.C. 1331 extends to alleged deprivations of constitutional rights perpetrated by District of Columbia officials who were acting under federal orders and supervision.

2. Whether the court below properly held that respondents could be granted federal judicial relief from injuries which they suffered because of prosecutions begun in bad faith in the local courts of the District of Columbia on the basis of arrests made without probable cause, when those prosecutions had already been discontinued and the local courts had held that they were powerless to grant such relief.

3. Whether a federal court, having found that mass arrests were presumptively invalid because not founded on probable cause, in a class action may order the sequestration of the arrest records in order to preserve the *status quo* pending final decision and may also declare that among the kinds of final relief to be considered by the District Court are expungement or permanent sequestration of those records and the return of collateral deposited by those arrested.

COUNTERSTATEMENT OF THE CASE

Little need be added to the comprehensive statement of facts and proceedings set forth in the opinion of the court below (see App. A, pp. 3-36), but certain additional facts from the record of a related case have been included in an appendix to this brief (Appendix F)[1] because they

[1] That case is *Kuhn v. Wilson*, Civil Action No. 956-71, D.C.D.C., a damage suit by 15 persons arrested on May 3 and 4, 1971. It is one of the related cases referred to and drawn upon the court below (App. A, pp. 7, and 17, n. 22) and cited by petitioners in their brief (page 5 and Appendix E to that brief).

Appendix F includes additional excerpts from Police Chief Wilson's deposition in the *Kuhn* case, together with the affidavit of then-Attorney General Mitchell and excerpts from answers to interrogatories filed in *Kuhn v. Wilson* by Mr. Mitchell and then-Deputy Attorney General Kleindienst.

spell out the heavy federal involvement in the arrests and prosecutions which give rise to this action. That involvement becomes relevant in view of petitioners' insistence that this case involves novel questions respecting the power of the federal courts to inquire into violations of constitutional rights by local officials of the District of Columbia. Those questions are not really presented, for the April-May 1971 mass arrests which gave birth to this case were far from mere local police actions. There was federal participation at every stage and the D.C. police knew they were under federal control.

Those arrests occurred as a result of large-scale demonstrations against the policy of the national government. They involved citizens who came from all over the country to make that protest here at the seat of government. It is nonsense which finds no probative support in the record to suggest that such a large and diverse gathering was under unified command or had an "announced" common plan. The Court of Appeals' description of the demonstrators and the range of their intentions provides the most effective answer to petitioners' unjustified attempts to paint a picture of paramilitary invasion threatening "planned outrage":[2]

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[2] See Brief for Petitioners, pages 4, 15, and Appendix D. It is in fact a species of outrage for petitioners to rely on the "May-Day Tactical Manual" published by one splinter group but attributed by petitioners, in the worst tradition of guilt by association, to thousands of variously motivated persons.

This case, of course, arises on a motion for preliminary injunction and the facts alleged in the complaint together with the statistical data provided by petitioners at the request of the court below (see App. A, p. 7) provide the basic record. App. A, p. 38.

> They [the demonstrators] represented a broad spectrum of philosophy and goals. Some were from the outset dedicated to provoking direct, and indeed violent, confrontations with public authority. Others, though committed to nonviolence, espoused the tactics of civil disobedience. Still others were determined to carry out their protest activity by entirely lawful means. Finally, there were the bystanders and observers – thousands who were not participating in the anti-war movement, but were pulled by the magnet of viewing first hand the events of great moment they sensed were about to unfold.
>
> (App. A, p. 12)

As might be expected in the event of a major protest of national policy at the nation's capital, the federal government supervised the planning and orchestration of the official response. Senior Justice Department officials were particularly heavily involved in this process,[3] for "the Justice Department has always clearly had control over the actions of the City government in demonstrations, going back to 1963." (App. F, p. A.2) While petitioner Wilson as Chief of the D.C. Metropolitan Police Department was placed in command of the "combined police forces utilized to maintain order in connection with the demonstrators, such as the U.S. Park Police

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[3] Among the high Justice Department officials involved was Justice Rehnquist, who was then an Assistant Attorney General. See Respondents' Motion to Disqualify Justice Rehnquist, filed simultaneously with this brief.

and the D.C. National Guard,"[4] that decision was made by the Attorney General (App. F, p. A.6); and Chief Wilson has stated:

> As a political matter of fact I don't think there was any question that the Justice Department is the representative of the President and the District Government is a creature of the Federal Government. (App. F, p. A.3)

Indeed, it is only since 1968 that the heads of the District Government have been more than nominally involved in the chain of command during demonstrations (App. F, pp. A.2, A.3).

Between April 1 and May 3, Chief Wilson and other local officials met repeatedly with officials of the Justice Department and other Federal offices, including the White House staff, to plan and coordinate official action both before and during the demonstrations (App. F, pp. A.7, A.15). It was the Justice Department which first gave and later revoked the permit for demonstrators to camp on federal parkland in West Potomac Park (App. A, pp. 13, 14). When nearly 8000 arrests occurred on May 3, 1971, "volunteer" attorneys from the Justice Department assisted the police in the spurious booking procedures which resulted in falsified arrest forms (App. A, p. 20). Depending on where arrests occurred or what charges were filed, the U.S. Attorney rather than the Corporation Counsel bore the prosecutorial responsibility (App. A, pp. 27 and 30, n. 28). There was, in short, a complete intermixture of federal and local action but always with

[4] The President serves as commander-in-chief of the D.C. National Guard, and the Mayor-Commissioner must ask for his assistance in the event the Guard is needed. See D.C. Code (1967 ed.) §§39-112, 39-603.

the clear understanding that federal officials had final authority over the actions of petitioners and other local officials.

In most other respects respondents do not dispute petitioners' statement of the case, although it is far less informative than the opinion of the Court of Appeals and it mutes the statistical and other factual bases for that court's conclusion that the police used "an arrest procedure that was not rooted in probable cause determinations" (App. A, p. 59) and therefore was "presumptively invalid" (App. A, p. 53). Over two-thirds of the informations filed by the Corporation Counsel's Office were disposed of by dismissal either at the instance of the prosecutor or by the trial court for want of prosecution or lack of evidence. See App. A, p. 30. There is little reason to think that the additional cases in which an election was made to forfeit collateral would have broken down differently if they had gone to final hearing.

The actual decision by the Court of Appeals is extremely limited. It holds that the District Court has "federal question" jurisdiction to entertain the suit as a class action (App. A, pp. 38-46, 51-53); that the case is now ripe for decision (App. A, pp. 46-47); that pending final decision, and as a part of final relief in those cases where petitioners do not produce affirmative evidence to support an arrest, the maintenance and dissemination of arrest records should be limited, but the question of whether actual expungement or sequestration is the appropriate final remedy should be deferred (App. A, pp. 60-64); and that the District Court is empowered to *consider* as possible final relief an order returning forfeited collateral in appropriate cases (App. A, pp. 67-69).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This case is a poor vehicle for the questions which petitioners have urged upon the Court. Two of those questions, having to do with lines of jurisdiction between the Article I and Article III courts of the District of Columbia, are not properly presented by the record in this case. That record shows heavy federal involvement in the police and prosecutorial actions which gave rise to this suit, so that there can be no claim here that the lower federal courts were interfering with review of purely local actions, assuming that that claim could ever validly be made in the aftermath of arrests which grew out of a major demonstration against national policy carried on at the seat of the national government.

Nor do the actions which gave rise to this suit present any novel question concerning police power to deal with massive civil disorders or similar emergencies. The District of Columbia authorities had ample power for that purpose but they chose not to use it. Instead, they went through a charade of arrests and prosecutions which they knew from the outset had no foundation in probable cause. In doing so, they fairly invited the relief which the court below granted, and no claim can be made by petitioners that that relief departs from established principles.

1. As is evident from the opinion of the Court of Appeals and from the facts developed in a related case which are set forth in Appendix F at the back of this brief, the police actions which gave rise to this suit were carried out under the general supervision of high-ranking federal officials. Indeed, federal and local action decisions were completely intertwined.

Factually as well as legally, then, this case does not really present the asserted question of whether purely local police actions by District of Columbia officials come within the "federal question" jurisdiction of the District's Article III courts pursuant to 28 U.S.C. 1331(a). Indeed, if that question were fairly presented, it would seem that it had already been decided by this Court's closing statement in *District of Columbia v. Carter*, 409 U.S. 418, 432-433 (1973):

> . . . Just as '[w]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require, *United States v. Price*, 383 U.S., at 801, so too we are not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it. This is not to say, of course, that a claim, such as a possible claim against Officer Carlson, of alleged deprivation of constitutional rights is not litigable in the federal courts of the District. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Bell v. Hood*, 327 U.S. 678 (1946).

In their own effort to avoid giving 28 U.S.C. 1331 'the broad scope its language and origins require,' petitioners seek to dismiss the second sentence of this passage from *Carter* on the hypothesis that in that case police officer Carlson may have been enforcing "an Act of Congress of nationwide application." (Brief for petitioners, p. 14.) One would suppose that if the Court had considered such a distinction important it would have said so in *Carter;* but it is hard to see how petitioners could have drawn

any support for their hypothesis from a case in which the posited facts were that the officer Carlson had assaulted the plaintiff without probable cause, using brass knuckles, in a neighborhood bar; he was evidently not enforcing any law at all at the critical time. See *Carter, supra,* 409 U.S. at 48 and the Court of Appeals opinion under the name *Carter v. Carlson,* 447 F.2d 358, 360, 144 U.S. App. D.C. 388, 390 (1971).

In *Carter* this Court held that the same reasoning which excluded federal officials from liability under 42 U.S.C. 1983 applied as well to officials of the District of Columbia. At the same time, by citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) and *Bell v. Hood,* 327 U.S. 678 (1946) in the passage quoted above, the Court clearly indicated that District of Columbia officials, like federal officials, remain suable under §1331(a) for deprivations of constitutional rights.

If *Carter* did not finally lay to rest the notion that §1331 jurisdiction is to be scaled down to fit the limitations of the Civil Rights Acts, this Court's decision last term in *City of Kenosha v. Bruno,*____ U.S. ___, 37 L.Ed. 2d 109, 116-117 (1973) must surely have done so. In that case the Court reaffirmed and broadened an earlier ruling that municipalities are not 'persons' suable under 42 U.S.C. 1983, but nonetheless remanded the case for consideration of possible 'federal question' jurisdiction under §1331.

Respondents submit that this Court need not revisit a question so well settled merely in order to underline what is already clear to everyone but petitioners.

2. This case is also a poor vehicle for exploring questions of comity as between the District's Article I and Article III courts; for it falls within three well-recognized exceptions to the doctrine of abstention which this Court laid down in *Younger v. Harris*, 401 U.S. 37 (1971), and related cases, as the court below was at pains to point out.

First, at the time this action was commenced, in the immediate aftermath of the 1971 arrests, there was, as the Court of Appeals found, substantial evidence that the criminal prosecutions then pending in the Superior Court for the District of Columbia were not being conducted in good faith inasmuch as there was no foreseeable likelihood that petitioners could prove a *prima facie* case in the great majority of those prosecutions. See App. A, pp. 5 and 40. Moreover, as the Court of Appeals noted, the local courts of the District of Columbia had by their own rulings and rules denied themselves the power to grant the relief which respondents seek: expungement of arrest records and return of forfeited collateral. See App. A, pp. 43-46. Thus respondents were faced with the prospect of irreparable injury arising from indefensible prosecutions, unless they could secure federal relief. Compare *Younger v. Harris*, 401 U.S. at 53-54. Finally, the abstention doctrine does not apply to a case in which there is no pending 'state' prosecution (*Id.*, 401 U.S. at 41), and all criminal proceedings in the Superior Court for the District of Columbia had already come to an end at the time of decision below. See App. A, pp. 41-42.

There is thus no real occasion to consider whether or to what extent the doctrine of abstention under 28 U.S.C. 2283 applies to the Article I courts of the District of Columbia. It might be pointed out, however, that in enacting

the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.*, Congress spelled out with great specificity the instances in which it intended that those courts should be treated like state courts under the various provisions of Title 28 of the United States Code; yet it omitted any reference to §2283. In *Palmore v. United States*, ____ U.S. ____, 36 L.Ed. 2d 342, 350-351 (1973), this Court concluded that in the 1970 Act Congress had "legislated with great care" in its amendments to just one section of Title 28 treating the District of Columbia Court of Appeals as a highest court of a "State", but declining to treat the various provisions of the District of Columbia Code as "State" statutes under §1257(2).

In *Palmore*, ____ U.S. at ____, 36 L.Ed. 2d at 357-358, the Court also recognized that the bifurcation of the District of Columbia's judiciary into completely separate systems of federal (Article III) and local (Article I) courts which was wrought by the 1970 Act, was not motivated by notions of federalism or by any intent to create a truly independent local judiciary. The legislative history of that Act shows that the primary motivation was to provide the District with increased judicial resources to deal with local crime. A secondary result was to free the federal courts of the District of Columbia to perform more capably their responsibilities under Article III jurisdiction.[5] See *Palmore*, *loc. cit.*

There was no intent on the part of Congress to surrender any measure of responsibility for the District's Article I courts to the local government of the District of Columbia. On the contrary, the House floor manager of the

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[5] See S. Rep. 91-405, 91st Cong. pages 1-3; H. Rep. 91-907, 91st Cong.; pages 3-4, 23.

1970 measure described it as an exercise of Congress' "expansive power to exercise exclusive legislation in all cases whatsoever in the seat of Government of the United States." (116 Cong. Rec. 8091, Rep. Abernethy.) Consistent with that outlook, the judges of the Superior Court and the District of Columbia Court of Appeals are appointed by the President, without limitation to D.C. residents;[6] they are subject to removal by a Commission on Judicial Disabilities and Tenure, four of whose five members are appointed either by the President or by the Chief Judge of the United States District Court for the District of Columbia;[7] all serious crimes remain the prosecutive responsibility of the U.S. Attorney;[8] process of the local courts and maintenance of order within those courts remains the responsibility of the United States Marshal;[9] and, of course, the District of Columbia remains essentially a non-selfgoverning federal enclave in which Congress retains all significant legislative power and there is "no division of power between the general and state governments." (*Kendall v. United States ex. rel. Stokes*, 12 Pet. 524, 619 (1838)).

If a principle of federalism or a doctrine akin to federal-'state' comity is to be found in this scheme, apart from the specific lines of separation spelled out in the 1970 Act, it is at best weak and obscure and its parsing-out is a task which can best be left to another case that

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[6] 84 Stat. 491, D.C. Code (1967 ed., Supp. V 1972) §11-1501.

[7] 84 Stat. 492 *et seq.*, D.C. Code (1967 ed., Supp. V 1972), §§11-1521 *et seq.*

[8] 84 Stat. 604-605, D.C. Code (1967 ed., Supp. V 1972), §23-101.

[9] 84 Stat. 512, D.C. Code (1967 ed., Supp. V 1972), §11-1729.

squarely and unavoidably poses that problem. For the reasons stated above, this case does not do so.

3. Nor does this case fairly present any question concerning "the use of reasonable police measures required, of necessity, to prevent riot-bent unlawful assemblies from effecting planned outrage in the streets," as petitioners have suggested in rather overblown prose (Brief for Petitioners, p. 15). Indeed, it cannot even be assimilated to those difficult cases in which the police utilized extraordinary powers and procedures which were designed and duly authorized to deal with emergencies, *e.g. Korematsu v. United States,* 323 U.S. 214 (1944), and *Sterling v. Constantin,* 287 U.S. 378 (1932). On the contrary, what distinguishes this case is that such powers and procedures existed but were deserted in favor of a process of arrest and prosecution which was known from the outset to have no foundation in probable cause. As is clear from the opinion in the court below, large numbers of innocent persons were consequently arrested, incarcerated, and then forced to give arrest record information about themselves and put up collateral as the price of their freedom. See App. A, pp. 16-25. Thus the Court of Appeals noted (*id.* at page 37):

> The action of the police in this case went beyond precautionary measures to ensure public safety by detention, as in *Korematsu;* officials did not merely stop and detain persons who had been on the streets during the May Day demonstrations, they preferred criminal charges against those who had been held in police custody. Even assuming for the sake of discussion that in the May Day emergency conditions police officials had the authority to suspend

> normal constitutional rights against unlawful arrest and detention – a suspension defendants claim not to have effected here – no legitimate overriding interest of public safety can be served by later booking or prosecuting on criminal charges those who were stopped and detained.

What was involved, as the court below pointed out, was a "common course of conduct by the police" (*id.*, p. 52) involving the suspension of the field arrest and booking procedures which had been designed for precisely the type of eventuality that occurred.[10] The result was a pervasive "lack of accountability" (*id.*, p. 53) and an absence of judicial and pre-judicial screening procedures "through which the facts surrounding the alleged misconduct could be verified" in each case. (*id.*, p. 57).

It is these features which distinguish the case from those cited at pages 15 and 16 of the Brief for Petitioners; neither the Court of Appeals nor respondents have questioned the power of the authorities to take lawful action against actual rioters. Similarly, petitioners' attempt to invoke the authority of *Terry v. Ohio*, 392 U.S. 1 (1968) is misconceived precisely because the police action approved

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[10] See *The Administration of Justice Under Emergency Conditions in the District of Columbia*, Report of the Committee on the Administration of Justice Under Emergency Conditions to The Judicial Conference of the District of Columbia Circuit (March 1973), pages 123-135, for a description of the alternatives to arrest and of the field arrest procedures. The background of the field arrest procedures is summarized in the Court of Appeals opinion, App. A, at pp. 10-11. In the 1968 riots involving widespread arson, burglary and far more serious crimes than the 1971 anti-war demonstrations, the police were able to prove probable cause in a very large percentage of the non-curfew cases.

in *Terry* was not an arrest. Indeed, it was pointed out that the stop-and-frisk authority upheld there serves different governmental purposes and involves greatly different consequences for invididual freedom than an arrest preceding a criminal prosecution (392 U.S., at 26):

> . . . An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.

Lastly, the Court of Appeals has not rendered any final decision which would justify a review of this case even in the view of it taken by petitioners. On the contrary, it has remanded the case to the District Court to give petitioners an opportunity to make a showing that specific arrests were in fact based on probable cause and, absent such a showing, to fashion a remedy that "limits the maintenance and dissemination of arrest records." (App. A, p. 61.) With respect to the prayer for the refund of forfeited collateral, the Court of Appeals deferred the question of relief and merely held that "there may be jurisdiction" to grant such relief on an appropriate showing after remand. (App. A, p. 68). The very limited question presented by this petition is whether these preliminary rulings constituted an abuse of discretion. *Brown v. Chote*, ___ U.S. ___, 36 L.Ed. 2d 420, 424-425 (1973). What petitioners seek at this juncture, therefore, is a holding

that neither branch of relief can be granted under any conceivable state of proof. Respondents submit that the past decisions of this Court effectively foreclose any such holding, see *Swann v. Board of Education*, 402 U.S. 1, 15 (1971), and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971), and that the entire question of appropriateness of particular relief is premature at this stage.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 956-71

ROGER S. KUHN, *et al.*,
Plaintiffs,

vs.

JERRY V. WILSON, *et al.*,
Defendants.

* * *

Washington, D.C.
Thursday, April 27, 1972

DEPOSITION OF JERRY V. WILSON

. . . [Page 10, referring to a January 1971 meeting with then-Deputy Attorney General Kleindienst in anticipation of the so-called "May Day" demonstrations]

Q. From what Mr. Kleindienst said to you there, what did you understand the role of the Justice Department to be in the upcoming demonstration, if it occurred?

A. I did not understand the role of the Justice Department to be anything from anything Mr. Kleindienst said to me there. The role of the Justice Department in this city, in my experience going back to 1963, to the Rally for Jobs and Freedom, and to [11] the 1967 Pentagon March, and to the Poor People's Campaign and to the 1968 disorders, and to the Inaugural Demonstration and

to the Moratorium, has been that the Justice Department has in most crises, and I dare say in all, though I may think of some exceptions, with some varying degrees of emphasis, the Justice Department has always clearly had control over the actions of the City Government in demonstrations, going back to 1963.

Q. By control, what were you seeking to convey?

A. What I am seeking to convey? Your question, I gather, is what business is it of the Justice Department with regard to demonstrations. What I was seeking to convey is it has been my direct experience, going back to 1963, that there has never been any question in the minds of police officials in the city that the Department of Justice has served as the President's representative with regard to operations with demonstrations and stood ready to achieve direct command of operations if necessary.

Q. Going back to 1963, then, the line of command would have been from the President to Justice to Chief Layton rather than from the President to the Board of Commissioners to Chief Layton?

MR. ZIMMERMAN: Just a moment.

THE WITNESS: I have no problem with answering that.

[12] Going back to 1963, as a matter of fact, I was then a Captain and was the staff coordinator of the demonstration in police headquarters. You understand, of course, that as a Captain and as a staff coordinator I obviously cannot tell you what the precise conversations were with regard to the Board of Commissioners and the President or anyone else. But there was an Assistant Attorney General in police headquarters who was monitoring the operation,

and while the Chief, who was then Chief Murray, was in command of all forces, there was no question in my mind, and I am sure there was no question in Chief Murray's mind, and no question in Deputy Chief Corvell's mind, that we responded to suggestions and if necessary to direct command from that Assistant Attorney General.

The Board of Commissioners, as a matter of fact, were not present in the command center and were at the District Building. They were kept apprised of what was going on, but there was no question in terms of the chain of command, that the chain of command in fact would have been from the Department of Justice to the command center. Much the same situation prevailed in 1967, except that Commissioner Tobriner visited police headquarters briefly. But, again, there was no question that he was not the individual that I would have asked what to do if a crisis had erupted.

[13] BY MR. RAUH:

Q. That was the same in '71?

A. There have been some variations. I think the system has become more refined in later years. In 1968, I think there was an obvious effort, and I think the Mayor played a much greater role in 1968 and in subsequent demonstrations as time has gone on in terms of the chain of command. So since then, and I will have to speak to the '69 Moratorium, '70 and '71, I have kept much closer direct communications with the Mayor, even though Justice was there.

As a political matter of fact I don't think there was any question that the Justice Department is the representative of the President and the District Government is a creature of the Federal Government.

. . . .

[37] BY MR. RAUH:

Q. Am I wrong in my characterization of your earlier indication, that you treated the chain of command as through the Justice Department in this operation?

A. The chain of command perhaps overstates it, but there is no question but that the Justice Department, nonetheless, issues instructions with regard to demonstrations and always has, and as a practical matter I think one could interpret that as chain of command.

There was no question during the Poor People's Campaign that when we met with Ramsey Clark and he spoke that we were supposed to do what he said without going and asking the Mayor if he agreed.

I think if you understand the informal chain of command, I don't really think I can quarrel with that, although the Mayor was in constant conversation with the Assistant Attorney General, [38] also, no doubt, and with me, and the Mayor has the legal authority to suspend me. Therefore, the legal chain of command is through the Mayor in any event.

But as a practical matter that is not the way demonstrations have ever worked in my experience.

* * *

AFFIDAVIT OF JOHN N. MITCHELL

AFFIDAVIT

John N. Mitchell, being first duly sworn, deposes and says:

1. I am the Attorney General of the United States and I make this affidavit in support of a motion to dismiss

or in the alternative for summary judgment to be filed in this proceeding in which I am a named defendant. I have read the complaint filed in this proceeding.

2. In matters concerning demonstrations and potential civil disturbances it has been the policy of the President of the United States to look to the Attorney General for recommendations with respect to the employment of federal troops throughout the states and in local communities in the event civil disturbances occur and the use of federal troops is indicated. When, as Attorney General, I recommend employment of federal troops, it is my responsibility to outline the mission and make recommendations concerning the use and withdrawal of troops. If civil disturbances arise in the various states it is the governor of the state, or in certain circumstances the state legislature, that requests the use of federal troops. In the District of Columbia, the Mayor is the official who would be consulted with respect to the use of federal troops.

3. I have designated the Deputy Attorney General of the United States as my Chief of Staff to coordinate all federal activities in connection with the discharge of my responsibilities to the President with regard to demonstrations.

4. In view of the announced demonstrations scheduled to take place in Washington, D.C., during April and May 1971, representatives of government agencies met in March 1971 to consider the problems of the forthcoming demonstrations. Thereafter, various representatives of government agencies met several times to consider the problems with respect to the demonstrations. Although, as Attorney General, I attended only a few of these meetings, I was represented throughout the various conferences

by the Deputy Attorney General, who acted as my Chief of Staff for these purposes and who verbally reported regularly to me.

5. I was advised by the Deputy Attorney General that it was recommended that Chief Jerry V. Wilson, Metropolitan Police Department, have over-all command of all police activities with respect to the impending demonstrations. This command would include, in addition to the Metropolitan Police, the combined police forces utilized to maintain order in connection with the demonstrations, such as the U.S. Park Police and the D.C. National Guard (prior to its federalization in the event martial law should be declared). I affirmed the recommendation with respect to the Chief of Police.

6. As Attorney General charged with responsibilities relating to demonstrations and potential civil disturbances as hereinbefore set forth, I state with respect to the May Day demonstrations which were scheduled to commence on May 3, 1971, that there were never any discussions between myself, the Deputy Attorney General, Chief Jerry V. Wilson of the Metropolitan Police Department, or anyone else, concerning the manner and methods for the utilization of police forces or the tactics to be used by the police in arresting and apprehending violators of the law during such May Day demonstrations.

7. In addition, with respect to those persons arrested in connection with the May Day demonstrations on May 3 and 4, 1971, I am informed and believe and therefore state that the procedures used following arrest and the places in which those arrested were to be detained were determined by the Chief of Police and did not result from any agreement or understandings between myself, the

Deputy Attorney General, Chief Wilson, or officials of the District of Columbia Government.

8. In sum, I did not participate in any of the decisions made with respect to the arrest and processing of violators of the law during the May Day demonstrations.

/s/ John N. Mitchell
JOHN N. MITCHELL

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 17th day of August, 1971.

/s/ Audrey Anne Crump
Notary Public

My commission expires August 31, 1971.

* * *

DEFENDANTS' ANSWERS TO INTERROGATORIES

Pursuant to Rule 33, Federal Rules of Civil Procedure, defendants John N. Mitchell and Richard G. Kleindienst, Attorney General and Deputy Attorney General respectively, being first duly sworn, answer interrogatories served upon them by plaintiffs.

Question 1. With respect to each meeting referred to in paragraph 4 of defendant Mitchell's affidavit dated August 17, 1971, state:

(a) the date;

(b) the place;

(c) the participants and the agency each participant represented;

(d) what was said by each person in as much detail as you can recall or determine from your records.

Answer 1. Since all plaintiffs were arrested on either May 3 or May 4, 1971, only those meetings which considered the April-May demonstrations in general, including the demonstration activities proposed for May 3-4, or which were concerned specifically with the demonstrations on May 3-4, are referred to in this answer.

A meeting was held in the office of the Deputy Mayor of the District of Columbia on April 1, 1971. Those in attendance and the agencies represented by them were: Jerry V. Wilson, Metropolitan Police Dept., James Maddock, Fed. Prot. Service, N. Robert Karicker, Fed. Prot. Service, GSA, Colonel Frank McKetta, Chief, Fed. Prot. Service, GSA, A. W. Innamorati, Asst. Comm., GSA, T.P. Derdock, Fed. Protective Service, GSA, Charles L. Southward, D.C. National Guard, R. Richards Rolapp, Justice, Gerald D. Fines, Justice, Richard G. Kleindienst, Justice, Harlington Wood, Jr., Justice, Major General C. L. Fought, Department of the Army, George Rodericks, D.C. Civil Defense, Graham Watt, Deputy Mayor, Roland M. Giles, MDW, Bernard R. Meyer, Interior, Russell Dickenson, National Capital Parks, James P. Deely, Lt., U.S. Park Police, Grant Hughes, U.S. Park Police, Gary McLeod, U.S. Secret Service, Lieutenant Colonel Edward M. Scott, Dept. of the Army, Col. C. C. Bryant, D.C. National Guard, Chief James M. Powell, U.S. Capitol Police, and John Ingram, Office of the Deputy Mayor.

This meeting consisted of a discussion of the demonstration planned for April 24, 1971 by the National Peace

Action Coalition and succeeding demonstrations in Rock Creek Park proposed by the Peoples' Coalition for Peace and Justice (PCPJ).

Representatives of various federal agencies were briefed at the Justice Department on April 16, 1971 concerning the up-coming demonstrations planned by the Viet Nam Veterans Against the War, who proposed to camp on the Mall; by the National Peace Action Coalition, who proposed to march on April 24, 1971; and by the PCPJ, who proposed to camp in Rock Creek Park.

Those in attendance and the agencies represented by them were: Richard G. Kleindienst, Justice, Harlington Wood, Justice, Gerald D. Fines, Justice, L. Patrick Gray, III, Justice, H. K. Reinecker, ACDA, Charles S. Barden, Jr., EPA, Richard D. Brady, VA, J. R. Manno, OEO, A.L. Philbrook, USIA, William C. Holembe, USIA, R. F. Wisniewski, Selective Service, Richard G. Robbini, Interior, John R. Garnett, Interior, P. W. Slattery, Labor, William C. Maylin, IRS, E. E. Mitchell, GSA, James W. Hardgrove, GSA, Jim Cullen, GSA, N. Robert Kaucher, GSA (Reg. 3), Robert L. Hogan, EEOC, Ken Stallo, Justice, W. J. Abernathy, OSD, Bernard J. Beary, Treasury, Charles D. Pierce, OEP, Charles E. Weithouer, DOT, Harold S. Nilson, AID, Clinton Smith, CSC, Karl Ruediger, CSC, Archie D. Grimmett, Commission on Civil Rights, Jacob B. Berkson, GSA, Edward A. Sampoyer, OSD, Howard P. Wace, State, Leonard G. Berman, USAF, Jim Curvey, HUD, Howard J. Osburn, CIA, T. Muir, Navy, Capt. W. Gundlard, Navy, Shirley M. Willis, Peace Corps, Ben Luding, D.C. Govenment, C. H. Thomas, Jr., Post Office Dept., Donald E. Boslocy, AEC, John L. Lubburn, NSA, Stuart H. Clouke, HEW, John Will, Commerce, Carl B. Barnes, USDA, Grove Webster, NASA, Walter G. Ingerski, DSA, and C. Mullaly, Army.

The subjects of (1) demonstrators blocking entrances to Government buildings; (2) bomb threats (3) evacuation of buildings; (4) excusal of employees; and (5) the advisability of granting requests by demonstrators for an audience with agency officials were discussed. The possible use of United States Marshals, the National Guard and other federal troops was also mentioned.

A meeting convened at the Justice Department on May 1, 1971. Those in attendance and the agencies represented by them were: The Deputy Attorney General, Richard G. Kleindienst, Robert C. Mardian, Assistant Attorney General, Thaddeus R. Beal, Secretary of the Army, Lt. Gen. Hugh M. Exton, Director of Military Support, Department of the Army, Maj. Gen. R. M. Gleszer, Commanding General, Military District of Washington, R. Kenly Webster, Acting General Counsel, Department of the Army, William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Donald E. Santarelli, Associate Deputy Attorney General, Jerry V. Wilson, Chief of Police, MPDC, John D. Ehrlichman, Assistant to the President for Domestic Affairs, Gerald D. Fines, Special Assistant to the Deputy Attorney General, and Harlington Wood, Jr., Associate Deputy Attorney General.

The demonstrations proposed for Washington during the following week were the subject of discussion at this meeting. Matters discussed included available intelligence estimates as to the numbers and intentions of the demonstrators, the possible use of the National Guard and other military forces. The subject of working hours for federal employees on Monday, May 3, also was discussed at this meeting. The meeting also involved a discussion regarding demonstrators then in Washington, who had assembled in West Potomac Park and whether such demonstrators should be allowed to remain in West Potomac Park.

A second meeting on May 1, 1971 was held at the Justice Department in the afternoon. Those in attendance and the agencies represented by them were: John Dean, White House, Jerry V. Wilson, Chief of Police, William H. Rehnquist, Office of Legal Counsel, Gen. Charles L. Southward, D.C. National Guard, R. Keniy Webster, Acting General Counsel, Department of the Army, Col. C. C. Bryant, D.C. National Guard, Maj. Gen. R. M. Gleszer, Army, Paul Fuqua, M.P.D.C., Public Info. Officer, G. M. Alprin, M.P. D.C., Dep. General Counsel, Thomas Kelley, Asst. Director, USSS, Gary McLeod, SAIC, USSS, C. Peter Raynor, Attorney, Interior Dept., Lt. Gen. H. M. Exton, Army, Daniel Henkin, OSD (PA), DOD, Richard G. Kleindienst, Deputy Attorney General, Robert C. Mardian, Assistant Attorney General, Gerald D. Fines, Justice, Harlington Wood, Jr., Associate Deputy Attorney General; Thaddeus Beal, Department of the Army, Col. C. C. Bryant, DONG, Deputy Chief Alfred D. Beye, Park Police, and C.D. Brennan, FBI.

The dispersal of the demonstrators, who were then assembled in West Potomac Park, was discussed. The discussion also involved the latest intelligence estimates as to the numbers and intentions of the demonstrators during the coming week in Washington, and the organization of PCPJ.

A meeting was held on May 2, 1971 at the Justice Department. Those in attendance and the agencies represented by them were: Alfred D. Beye, Deputy Chief, USPP, Thomas Kelley, Asst. Director, USSS, Russell Dickenson, Gen. Supt. National Capital Parks, Peter Raynor, Attorney, Interior, Roland M. Gleszer, MDW, Graham W. Watt, Deputy Mayor, D.C., Lt. Gen. John H. Hay, Ab. Corps, Fort Bragg, N.C., William H. Rehnquist, Assistant

Attorney General, Justice Dept., Richard G. Kleindienst, Deputy Attorney General, Powell Moore, Deputy Director, PIO, Justice, John Hushen, PIO Dir., Justice, Wayne B. Colburn, Dir. U.S., Marshal's Service, Will Wilson, Assistant Attorney General, Criminal Division, Justice, L. M. Pellerzi, Assistant Attorney General, Administrative Division, Justice, James Turner, Civil Rights, Justice, Gerald D. Fines, Justice, Capt. Jack K. Norris, SVIII, Abn. Corps, Fort Bragg, N.C., Thaddeus R. Beal, Under-Secretary of Army, H. M. Exton, Army, Harlington Wood, Jr., Justice, Donald E. Santarelli, Justice, and Chief Jerry V. Wilson.

The evacuation earlier that day of the demonstrators from West Potomac Park was discussed. A report was given as to the number of federal troops that were being made available and the possible need to use these troops in light of the then existing intelligence information was discussed. The geographical areas of responsibility for the National Guard and other military forces and the tasks which these troops could perform during the following week were also discussed.

The desirability as a matter of policy of arresting demonstrators who violated the law was generally agreed upon. The abandonment of vehicles and the use of helicopters to remove them were also discussed.

A second meeting on May 2, 1971, convened at the Justice Department. Those in attendance and the agencies represented by them were: Richard G. Kleindienst, Justice, Jerry V. Wilson, MPDC, Thaddeus R. Beal, Army, General Gleszer, MDW, Daniel J. Henkin, Defense, Kenly Webster, Department of the Army, John H. Hay, XVIII, Abn Corps, John Dean, White House, Harlington Wood, Jr., Justice, Paul Fuqua, MPDC, PIO, Powell Moore, PIO,

Justice, Jack K. Norris, XVIII Abn. Corps, Gerald D. Fines, Justice, Martin T. Nautalin, Army, Fred B. Ugast, Justice, Johnnie M. Walters, Justice, Fred Fielding, White House, Donald E. Santarelli, Justice, John Hushen, Justice, R. Richards Rolapp, Justice, Robert C. Mardian, Justice, and H. M. Exton, Department of the Army.

The discussions included reports on the latest intelligence estimates as to the numbers, locations and intentions of the demonstrators. The necessity of using troops in light of the then existing intelligence information and the proposed plans for the use of troops, were also considered.

A report was given as to the responsibilities of the police in connection with the scheduled demonstrations and the plans for locating and shifting police forces as circumstances might demand.

There was also a report given concerning coordination between the police and the military authorities. In response to a question raised, a report was given as to criminal offenses most likely to be involved in the demonstrations.

On Monday, May 3, 1971 a meeting was held at the Department of Justice.

A number of Justice Department attorneys and officials attended this meeting and most of the persons involved came and went throughout the meeting. Some stayed only for a short duration. Present at one time or another from the Justice Department were Messrs. Will Wilson, Henry Peterson, Harold Shapiro, Robert C. Mardian, Kevin Maroney, Ronald Gaynor, John Murphy, Alfred Hampton, Carl Belcher, William Tyson and Larry McWhorter. Also present during part of the meeting was Chief Jerry

V. Wilson of the Metropolitan Police Department, Gerald Caplan, Counsel to the Chief of Police, and Frank Murphy, Corporation Counsel.

The group was informed as to what had been occurring thus far that morning on the streets of Washington, including the fact that many arrests had been made. Efforts were made to suggest possible means by which matters such as feeding, housing and transporting prisoners, fingerprinting and other identification procedures, bail, processing through the police booking procedures and processing by the courts could be accomplished satisfactorily. Arrangements were made to have lawyers from the Justice Department assist in the processing of persons arrested.

A second meeting was held on May 3, 1971 at the Justice Department – those in attendance and the agencies represented by them were: Daniel Henkin, DOD, Jerry V. Wilson, MPD, Richard G. Kleindienst, Justice, Robert C. Mardian, Justice, John Hushen, Justice, William H. Rehnquist, Justice, Charles L. Southward, DCNG, James Powell, U.S. Capitol Police, H. M. Exton, Army, Kenly Webster, Department of the Army, T. R. Beal, Army, J. H. Hay, Army, R. Richards Rolapp, Justice, John Dean, White House, Capt. Robert W. Klotz, MPD, Paul Fuqua, MPDC, PIO, Russell Dickinson, National Capital Parks, Grant Wright, U.S. Park Police, Thomas Kelley, USSS, General Gleszer, MDW, Jack K. Norris, Army, Graham W. Watt, D.C. Gov't, John Dufner, Justice, G. M. Alprin, MPDC, Fred Ugast, Justice, Robert E. Krahling, Asst. Chief, U.S. Capitol Police, Thomas A. Flannery, U.S. Attorney, Harold H. Titus, Jr. Prin. Asst. U.S. Attorney, John R. Hess, Office of Corporation Counsel, C.F. Murphy, Office of Corporation Counsel, D. E. Santarelli, Justice, G. M. Caplan, MPD, Gerald D. Fines, Justice, Powell Moore, PIO, Justice, Harlington Wood, Jr.,

Justice, Norman A. Carlson, Bureau of Prisons, John D. Ehrlichman, White House, and John Dean, White House.

There was a discussion as to the personnel that would probably be needed for the following day in connection with the demonstrations. Information was received as to the number of demonstrators thought to be participating in illegal activities. It was reported that many of those who had been arrested would be released in time to participate further in illegal activities on the following day.

The need for the continued use of military forces was discussed. The numerical strength and proposed locations of the available military forces, and the possibility of securing reinforcements to relieve those who were then on duty, were also discussed.

The group was briefed as to the processing and location of demonstrators who had been arrested, and as to the need for additional personnel and equipment for use in processing arrestees.

The group was informed of the pendency of a habeas corpus proceeding before Sueprior Court Chief Judge Greene which had been instituted against the United States Attorney and the Mayor of the District of Columbia, among others.

Question No. 4. With respect to any communication between any official of the Justice Department including Messrs. Rehnquist, Ugast, Santarelli, and W. Wilson and defendants Mitchell and Kleindienst prior to, during and regarding the demonstrations held in April and May 1971, state:

(a) the date;
(b) the medium of communication (by telephone, in person, etc.);

(c) the place (if in person);
(d) the participants;
(e) what was said by each person in as much detail as you can recall or determine from your records.

Answer No. 4. The circumstances of the demonstrations on May 3-4, 1971 were such that a number of conversations between the Attorney General and the Deputy Attorney General and other officials in the Justice Department did occur each day in connection with the demonstrations of May 3-4, 1971. No log or record exists which would detail the number of such conversations.

These conversations would have consisted of a general discussion of the circumstances surrounding the demonstrations and the relaying of intelligence information regarding the projected demonstration events, or information concerning the actual events as observed by officials from the Justice Department. Such communications were for the purpose of enabling the Attorney General and the Deputy Attorney General to obtain information and advice needed by them in determining the policies and programs to be pursued by the United States Government, and to enable the Attorney General to discharge his official duties and responsibilities to the President of the United States.

/s/ John N. Mitchell
JOHN N. MITCHELL
United States Attorney (sic!)

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 21st day of January, 1972.

/s/ Audry Anne Crump
Notary Public

My commission expires August 31, 1976.

/s/ Richard G. Kleindienst
RICHARD G. KLEINDIENST
Deputy Attorney General

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 20th day of January, 1972.

/s/ B. Landsberger
Notary Public

My commission expires June 30, 1976.